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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

To: The Commission

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

VIACOM INTERNATIONAL INC.

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SUMMARY

Viacom International Inc. ("Viacom") hereby submits its reply comments in MM Docket No. 92-265. Viacom reiterates its support for the approach of promulgating regulations under Section 628 that rely, to the maximum extent possible, on the workings of the marketplace to achieve the goals of the 1992 Cable Act.

The 1992 Cable Act expressly contemplates that programmers will offer different price, terms and conditions to various distributors for a variety of reasons. Indeed, programmers are to be given flexibility in entering into agreements with distributors as long as they do not harm competition (rather than competitors). As a practical matter, then, nearly every distribution agreement will differ from all others in one respect or another. Accordingly, Viacom submits that a complainant must do more than show that there are differences in price or other terms among distributors in order to support a claim of discrimination.

In addition, in order to establish its _prima facie_ case, a complainant unable to demonstrate actual harm to competition must, at a minimum, demonstrate that the natural or probable result of the allegedly discriminatory activity is harm to competition. Because of the many legitimate differences that will appear in nearly every agreement, it would be an administrative burden on both the Commission and the programmer to justify each difference, even those that could not possibly

harm competition. Moreover, such an approach would cause a programmer to offer only homogenized contract terms, which would have the unintended effect of suppressing rather than encouraging competition.

Viacom also submits that the program access provision does not require a program service to deal with each and every distributor. There are many legitimate business reasons that would cause a programmer to limit the number of its distributors. For example, by limiting the number of distributors, it would provide incentives to those distributors to increase their distribution of the program service. Moreover, the Act contemplates that, in certain circumstances, a program service would enter into exclusive arrangements with a particular distributor. Accordingly, the Commission should reject the view of those commenters who urge that a program service be forced to enter into agreements with every distributor that desires to carry the service.

Viacom also reiterates its view that the forced public disclosure of the terms and conditions of carriage agreements will harm both distributors and consumers. The information contained in such agreements is highly proprietary and, if disclosed, could diminish competition between programmers and cause programmers to offer only standard terms to every distributor.

Finally, Viacom submits that it is appropriate to impose different and stricter standards under Section 616 than those that will be fashioned for Section 628.

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Viacom International Inc. ("Viacom"), by its attorneys, hereby offers its reply comments in the above-captioned proceeding.

I. Introduction

The comments filed in this proceeding generally fall into two widely divergent camps. On the one hand are commenters, like Viacom, that favor the Commission's approach of promulgating regulations that, while designed to address the concerns of Congress, rely to the maximum extent possible on the workings of the marketplace to achieve the goals of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act" or the "Act").[1] In

[1] Indeed, a principal policy of the Act is to "rely on the marketplace, to the maximum extent feasible" in order to achieve a diversity of views and information. 1992 Cable Act, § 2(b)(2).

contrast, a number of commenters urge the Commission to reject this approach and replace it with a highly regulatory regime not mandated by the Act, in order to achieve individual competitive advantages at the expense of cable programmers.

Viacom believes that the proposals set forth in its initial comments, and the Commission's overall thrust in the Notice of Proposed Rule Making, FCC 92-543 (Dec. 24, 1992) ("NPRM"), will achieve the goals of Congress, while limiting interference with the workings of the marketplace and with the important constitutional rights affected by the Act.[2] Specifically, Viacom has proposed the following:

- A de minimis exception to the program access rules should be adopted for any program service that is under common ownership with cable systems that account for fewer than five percent of the subscribers to the program service.[3] In such cases, the limited number of subscribers provided by commonly-owned cable systems is simply too insignificant to cause the program service to act in an anticompetitive manner in order to favor the commonly-owned cable systems.

- The program access rules should apply only in geographic areas in which the program service and cable

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[2] The fact that Viacom, in filing its comments, has offered specific proposals designed to limit any infringement on constitutional rights by any regulations to be promulgated pursuant to this proceeding should not be construed to mean that Viacom believes the Act's provisions are constitutional. Viacom reserves the right to challenge the constitutionality of both the statute and any implementing regulations.

[3] For entities, such as Viacom, with more than one program service, this test would be applied on a program service by program service basis. Thus, for such an entity, it is possible that one program service would be subject to the rules while another would not.

operator are under common ownership.[4] Since there is no incentive to favor one distributor over another in instances in which the program service has an attributable interest in neither, there is no reason to restrict the marketplace from operating freely. In all events, the program access rules should not apply beyond such "vertically integrated" areas in the case of programmers with relatively small cable holdings, such as Viacom. These entities clearly have no incentive to favor one technology over another or otherwise to act in a manner detrimental to the fundamental interests of their core business -- program services which seek the widest possible distribution consistent with good business practices.

- To demonstrate a violation of the statute, complainants must show that an activity (i) is "unfair," "deceptive" or "discriminatory;" (ii) is capable of significantly hindering distributors from providing satellite programming to consumers; and (iii) significantly harms competition in multichannel programming distribution.[5]

- Because of the many legitimate and pro-competitive considerations that can cause a variation in the price or other terms charged by a program service to its various distributors, the mere existence of such a variation cannot serve as the basis of a complaint of discrimination.[6]

- The Commission should adopt a "zone of reasonableness" within which a disparity in price is deemed to be non-discriminatory. This approach recognizes the existence of the legitimate considerations that can lead to price differentials among a program service's various distributors. Also, as a matter of administrative efficiency, this approach limits Commission involvement to only those cases likely to result in a finding of discrimination.

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[4] As used herein, the term common ownership means that a single entity has an attributable interest (as ultimately defined) in both the program service and cable operator.

[5] <u>See</u> <u>infra</u> Section III.

[6] <u>See</u> <u>infra</u> Section II for a more complete discussion of the myriad legitimate factors that determine the price and other terms ultimately charged a particular distributor.

- Non-discriminatory volume discounts that programmers may make available should be excluded from the calculation of the "zone of reasonableness."

- In order to make a prima facie case of price discrimination, a complainant, among other things, must demonstrate that the price offered by the vertically-integrated program service exceeds the price paid by the commonly-owned cable operator by more than 30%[7] (exclusive of any applicable volume discount offered on a non-discriminatory basis).

- Because information regarding pricing and rates is highly proprietary, the Commission's enforcement procedures must be designed to ensure that the complaint process is not used either by competing programmers or potential or existing distributors as a means to gain access to sensitive information in order to unfairly use it to the detriment of the programmer.[8]

- Buying groups should be eligible for volume discounts, but only if they agree to unitary dealings comparable to entities that are routinely eligible for such discounts.

- The program access provision should be applied prospectively; the abrogation of existing contracts is disfavored generally and is not required by the Act.

- Exclusive distribution agreements for new services are in the public interest because they encourage distributors to take the risk of devoting channel capacity and marketing support to an untested service. Accordingly, the Commission should allow such exclusive agreements for a period of up to ten years.

Viacom submits that these proposals, if adopted, will promote competition and diversity without unduly restricting the

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[7] This is the magnitude of the "zone of reasonableness" that Viacom has proposed in its initial comments.

[8] See infra Section V.

programming marketplace.[9] As will be demonstrated more fully below, those opposing such an approach seek to displace the normal workings of the marketplace, so as to achieve unfair competitive advantages which are not mandated by the Act.

II. The Mere Fact that Two Distributors Are Paying A Different Price or Are Subject to Other Different Terms for the Same Program Service Is Insufficient to Support A Claim of Discrimination

Several commenters suggest that any difference in the price, terms or conditions charged to one distributor as compared with another is sufficient to support a claim for discrimination. See, e.g., Comments of Advanced Communications Corp. at 6; Comments of Cable America Corp. at 14-16; Comments of The Coalition of Concerned Wireless Cable Operators at 3-4. As set forth more fully in Viacom's initial comments, however, the Act recognizes that there are a variety of factors that go into the determination of the price, terms or other conditions ultimately charged a particular distributor for a program service. Comments of Viacom at 15-18. Thus, given that there are legitimate business differences and distinctions among distributors and in what they offer program services and subscribers, the mere fact

[9] Superstar Connection and United Video, Inc. both argue that more lenient standards should be applied to superstations than other satellite-delivered program services. Comments of Superstar Connection at 5; Comments of United Video at 7. This argument has no support in either the statute or its legislative history. To the extent restrictions are applied, they should be applied equally to all program services subject to the Act.

that there are differences in price or other terms among different distributors is simply insufficient to serve, by itself, as the basis for a claim of discrimination.[10]

Indeed, the Act itself contemplates that different fees may be imposed as a result of differences in: (i) creditworthiness, financial stability, character, and technical quality (1992 Cable Act, §628(c)(2)(B)(i)); (ii) the cost of creation, sale, delivery or transmission of programming, either at the programmer's level or at the distributor's level (1992 Cable Act, § 628(c)(2)(B)(ii))[11]; or (iii) economies of scale, cost savings or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor (1992 Cable Act, § 628(c)(2)(B)(iii)). As explained in Viacom's initial comments, these subsections, far from being rigidly narrow in scope (as urged by opposing commenters), permit nearly infinite gradations of benefits and concessions which are

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[10] Those advancing a <u>per se</u> rule fail to acknowledge that the Act prohibits only <u>unfair</u> methods of competition or <u>unfair</u> or deceptive acts or practices. The Act expressly recognizes that differences in price and other terms are both fair and reasonable for a variety of reasons.

[11] Section 628(c)(2)(B)(ii) is intended to allow a programmer to consider differences in cost at the programmer's level and at the distributor's level in negotiating the price to be charged a particular distributor. <u>See</u> 138 Cong. Rec. S16,671 (daily ed. Oct. 5, 1992) (Senator Kerry: "Am I correct in understanding that as used in subsection (2)(B)(ii) the cost of creation, sale, delivery or transmission of programming refers to costs incurred at the multichannel video programming distributor's level as well as at the program vendor's level?" Senator Inouye: "That is correct.").

legitimately and reasonably bargained for by the parties in exchange for other countervailing benefits and concessions which may be important in the context of a particular negotiation.[12] See Comments of Viacom at 15-18, 38-57.

It is because of these numerous and legitimate factors that the Act recognizes that differences in price or terms are not discriminatory per se. Viacom's proposal to establish a "zone of reasonableness" is intended to take these factors into account without forcing the Commission to enumerate, examine and justify each price or term on a micro-managed basis.[13] A "zone" approach precludes distributors from making numerous obstructive claims of "discrimination" based on price differences that the Act considers wholly justified and reasonable. Viacom's approach will thus ease the administrative burden on the Commission and allow program services to market creatively to all distribution

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[12] Rules that limit the negotiating flexibility of programmers and distributors would force the homogenization of contract terms, and would also have the unintended effect of suppressing rather than encouraging competition. See infra Section V.

[13] Landmark Communications, Inc. supports the use of a "zone of reasonableness" based on absolute price differentials in addition to a percentage-based test. Comments of Landmark Communications, Inc. at 15-18. Viacom recognizes the concerns of Landmark and agrees that a price differential test stated in absolute dollar terms should be adopted, where appropriate, as an alternative to the percentage test. Thus, a price differential should be viewed as non-discriminatory even though outside a "zone of reasonableness" if, in pure dollar terms, it is simply too insignificant to have any effect on competition.

technologies in order to achieve widespread subscriber penetration.[14]

III. To Establish a Prima Facie Case, a Complainant Must Demonstrate, Among Other Things, Either Actual Harm To Competition or That the Natural or Probable Result of the Alleged Discriminatory Activity Is To Harm Competition

Several commenters also claim that there is no need to establish harm to competition in order to make a prima facie case of discrimination. See, e.g., Comments of National Rural Telecommunications Cooperative at 10-16; Comments of WCA at 34-36; Comments of American Public Power Association at 12.

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[14] As explained in its initial comments, Viacom seeks the broadest possible distribution of its program services to both cable operators and non-cable distributors. Various commenters ignore Viacom's current distribution practices and choose instead to misstate outdated events. For example, the Wireless Cable Association International, Inc. ("WCA") goes back to 1985 to suggest that Showtime Networks Inc. ("SNI"), a subsidiary of Viacom, failed to create a package of its own and third-party program services for distribution to home satellite dish owners because of pressure from a cable operator. Comments of WCA at 14, n.32. WCA fails to mention, however, that soon after SNI scrambled its program services in 1986, SNI's HTVRO subsidiary, Showtime Satellite Networks Inc. ("SSN"), entered into distribution agreements with several third-party program services to create a diverse program package for the home satellite dish owner market. SSN continues to offer several such diverse program packages to home satellite dish owners today. Similarly, some commenters complain that Showtime was not available through MMDS in the past, but fail to note the bad credit history of the MMDS industry in general. In any event, what is important is that Showtime (and each of Viacom's national program services) is available to virtually every MMDS distributor today. Rather than respond point-by-point to the various misstatements and mischaracterizations concerning Viacom's marketing and other practices, Viacom's comments focus on marketplace conditions as they actually exist today.

Essentially, they contend that (i) since the Act prohibits activities the _purpose_ of which is to hinder or prevent competition, there is no need to establish actual harm; and (ii) Congress already has found that the activities prohibited by Section 628(c) constitute the harm otherwise required by § 628(b). _Id_.

Viacom submits that these commenters have distorted the Congressional objectives embodied in the Act. Section 628(b) prohibits only activities "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers." 1992 Cable Act, § 628(b). Because potential complainants claim that they will rarely be able to obtain evidence of the subjective purpose of the programmer in offering different terms to different distributors (a "smoking gun"), commenters urge the Commission to presume that the purpose of _any_ difference in price, terms, or conditions is wrongful unless the programmer can justify the difference. It would be illogical, however, to presume that the "purpose" of an allegedly wrongful activity was to hinder competition if there were no reasonable likelihood that such a result could be achieved.[15] Thus, in the absence of an actual

[15] It would also be illogical for a business that is dependent on broad distribution to engage in practices and policies that would hinder distribution. _See_ Comments of Viacom at 8.

harmful effect, a complainant, in order to establish an improper purpose under the Act, must, at the very least, be required to establish that the natural and probable result of the activity would be harm to competition (rather than competitors). If this cannot be demonstrated, the Commission should not presume that the activity had a wrongful purpose; and without a wrongful purpose or effect, the activity is not prohibited by the Act. In sum, a complainant unable to produce any tangible evidence of a harmful effect, must, at a minimum, in order to establish a wrongful purpose, either produce overt evidence of that purpose[16] or demonstrate that the natural and probable consequence of the conduct at issue is the harm prohibited by the Act.

That a complainant should be required to show harm to competition becomes readily apparent when one seeks to apply the view of opposing commenters regarding the nature of § 628(c), particularly Section 628(c)(2)(B). As demonstrated in Section II, supra, this subsection expressly recognizes a variety of legitimate factors that result in a programmer offering different "prices, terms, or conditions of sale" to different distributors. The purpose of these differences is to allow a program service to increase distribution and obtain a fair return on its investment. Indeed, the Senate Report states that the provision was designed to give a program service "flexibility in negotiating prices,

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[16] Of course, if a distributor were able to produce overt evidence of a wrongful purpose, it would have established its prime facie case.

terms, and conditions for distribution so long as [they] allow competition to flourish." S. Rep. No. 92, 102d Cong., 1st Sess., at 28 (1991) ("S. Rep. 92"). Opposing commenters seek to reduce this flexibility by requiring that a program service justify each and every difference, even in the absence of any showing that it harmed or could reasonably be expected to harm competition. Such a reading is not only not found in the Act, it would lead to ludicrous results.

Given the range of factors acknowledged by the Act as being legitimate reasons for differentiating in price, terms and conditions, as well as the matrix of situations that lead a programmer to customize individual carriage agreements to the particular needs of almost every distributor, virtually every carriage agreement will be different from all others in one respect or another. The view urged by those commenters opposing the Commission's position would thus essentially force a programmer to justify every aspect of every carriage agreement. This would not only place an impossible administrative burden on the Commission, but could allow a complainant to establish its prima facie case merely by noting any difference in terms or price, including those that could not conceivably have an impact on competition.[17] For example, a program service could be forced

[17] As explained in Section V, infra, the Commission should ensure that the complaint process is not used merely to gain a competitive advantage through access to proprietary information. The standard sought by opposing commenters would run counter to (continued...)

to explain why it was not discriminatory to offer one distributor a three-year affiliation agreement, while another was given a four-year agreement. Or why it was reasonable to give one distributor one type of marketing incentive while another was given a different type of marketing incentive. This approach would ultimately be detrimental to all distributors and, in turn, consumers, because it would cause a programmer to be extremely reluctant to offer anything other than standardized terms and conditions for fear of having to spend the time and expense of justifying each difference.

Section 628(c)(2)(B) is clear, however, that program services are not prohibited from offering such different terms. Indeed, as explained above, different terms or conditions which could not reasonably be expected to harm competition will be a legitimate part of virtually every carriage agreement. Thus, the Commission's approach is proper because it furthers the goal of Section 628 and offers a realistic and manageable basis for its implementation. Moreover, by focusing on harm to competition -- rather than a particular competitor -- the Commission will preclude a potential complainant from obtaining individual economic gain without any benefit to competition or consumers. See Comments of Viacom at 12-15.

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[17](...continued)
this objective by causing the disclosure of every term in nearly every carriage agreement.

Accordingly, Viacom agrees with the NPRM that the only meaningful way to enforce Section 628 is to require a complainant to demonstrate that any difference in price, terms, or conditions either has caused harm to competition or could reasonably be expected to cause harm to competition. Only if this is established, should the programmer be required to demonstrate why the difference is justified.

IV. The Act Does Not Require A Vertically-Integrated Program Service To Enter Into A Carriage Agreement With Every Distributor

Several parties contend that the program access provision requires a program service to deal with each and every distributor. See, e.g., Comments of National Satellite Programming Network, Inc., at 10; Comments of The Coalition of Concerned Wireless Cable Operators at 3-4. This view is supported by neither the language and structure of the Act nor its legislative history.

It is first significant to note that the House amendment that ultimately became Section 628 failed to include language expressly prohibiting "unreasonable refusals to deal" that was contained in earlier iterations of the Act. See, e.g., H.R. 5267, 101st Cong., 2d Sess., § 8(a) (1990); S.12, 102d Cong., 1st Sess., § 640 (1991); S.1880, 101st Cong., 2d Sess., § 640 (1990). Indeed, even those bills recognized the legitimacy of exclusive distribution arrangements and distinguished the grant of exclusivity from an unreasonable refusal to deal. See, e.g., House Committee on Energy and Commerce, H.R. Rep. No. 682, 101st Cong., 2d Sess., 104 (1990) ("An exclusive contract permitted under this section must be a bona fide exclusive distribution agreement entered into freely and without coercion for legitimate business reasons.").

The legislative history thus demonstrates that refusals to deal with a given distributor are not prohibited per se. Moreover, other provisions of the Act contemplate that a programmer may deny access to its program service to a particular distributor. Specifically, Section 628(c)(2)(B)(iv) acknowledges that there are situations in which a programmer may enter into exclusive agreements which would restrict the access of other distributors to the program service.[18] Similarly, Section 616, which regulates carriage agreements, does not prohibit exclusive arrangements, but only prohibits cable operators from "coercing" a program service to provide exclusivity.[19] There is simply no basis to argue that any refusal to deal with a particular

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[18] It should also be noted that exclusive contracts, to the extent that they are prohibited at all, are only prohibited between a cable operator and a program service. See § 628(c)(2)(C),(D). The Act thus recognizes that exclusive distribution contracts with non-cable distributors are in the public interest because they help differentiate their program offerings and bolster their competitive standing vis-a-vis cable operators.

[19] See infra Section VI for a discussion of coercion in the context of § 616.

distributor is a <u>per se</u> violation of the program access provision.

Thus, the Act does not, and should not, impose an obligation on each programmer to make its programming available to every distributor. It should not be read to create an obligation to deal which would subject every distribution decision to regulatory challenge.

Indeed, there are sound, pro-competitive reasons why a program service might choose to limit the number of its distributors and elect not to make its programming available to all who may ask to distribute it. These reasons are plainly "facilities-neutral" and do not have as their purpose or effect the favoring of cable technology.

For example, Viacom makes its national program services available to every HTVRO subscriber in the United States. Each HTVRO owner can obtain that programming from a variety of sources. Viacom reaches consumers directly as a retailer through SSN's placement of "800" number ads in consumer publications and through local hardware manufacturers, sellers and installers, and indirectly as a wholesaler through a variety of competing non-cable program packagers to which Viacom licenses its programming, and through cable operators who wish to sell to the HTVRO market.

As a result, there is robust competition among all of these firms for the sale of Viacom's programming to each HTVRO subscriber in the country. Viacom does not, however, make its programming available to every packager in the HTVRO business. Rather, Viacom has made the judgment that by licensing a smaller number of packagers it can encourage each of those packagers to commit more time, effort and other resources to market Viacom's program services and that, as a result, it can effectively, and aggressively, add incremental HTVRO subscribers. The Act does not, and the Commission's regulations should not, provide a mechanism for forcing Viacom to make its program services available to every packager in the HTVRO business.

Similarly, as DBS distributors become operational, programmers may decide, for pro-competitive reasons, to license their program services to some but not all DBS distributors while the program services evaluate whether having a few or several DBS distributors will provide the greatest opportunity for incremental subscriber growth. Again, these are decisions which programmers should not have to justify before the Commission.

Of course, wholly apart from a programmer's decision as to which and how many distributors will afford the greatest opportunity for growth, there may well be instances where distributors and programmers may not be able to agree upon the terms of a carriage agreement because the distributor's demands are simply too onerous. Programmers cannot be forced to license programming on unacceptable terms just because the distributor says it needs the service to become or remain viable. (See Comments of DirecTv at 2.) The Act should not be transformed into a vehicle for litigating every negotiation impasse and elevating every unsatisfied carriage agreement demand into an "unfair practice" or "discrimination."

V. Forced Public Disclosure of the Terms And Conditions of Carriage Agreements Will Suppress Rather Than Promote Competition

It is essential that the Commission guard against the forced public disclosure of terms and conditions under which program services are licensed to multichannel video programming distributors. See Comments of Viacom at 23-26. Such forced disclosure, which is urged by some of those seeking uniform pricing,[20] would ultimately defeat one of the principal objectives of the Act: competition would be lessened, not promoted.

Programmers compete against each other in licensing their program services in a wide variety of ways to both cable operators and non-cable distributors. For example, SNI competes most directly with other premium service programmers not only on price, but on an array of other levels, including, for example, the amount and type of ongoing promotional support, incentives for subscriber growth and system penetration, channel positioning, support for launching services, incentives for

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[20] See, e.g., Comments of Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewer's Constitutional Rights at 3-4; Joint Comments of Bell Atlantic and the Pacific Companies at 10.

customer service representatives to induce sales and telemarketing support.[21] If, however, in the guise of preventing "discrimination," vertically integrated programmers were forced to disclose publicly the terms and conditions under which each of their program services is licensed, competing programmers would promptly know the details of each other's key competitive tools. Prices would likely be stabilized and other competitively important terms and conditions would quickly be neutralized to the detriment of distributors and, in turn, consumers, who would no longer benefit from various discounts previously offered to distributors.[22]

Any sharing of sensitive competitive information that would result from the forced public disclosure of the terms of carriage agreements would hurt competition and contradict fundamental antitrust principles which Congress made clear were preserved and not supplanted by the Act. See, e.g., S. Rep. 92 at 29. It would be an odd result if in the context of promoting competition, the Commission were to promulgate rules that had precisely the opposite effect.

The Supreme Court has long recognized the competitive harm that results when price or other competitively sensitive

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[21] Obviously, these same considerations affect basic cable services.

[22] Moreover, non-vertically integrated programmers, which would not be subject to such rules of disclosure, would always have an unfair competitive advantage over their vertically integrated counterparts.

information is exchanged among competitors. In United States v. Container Corp. of America, 393 U.S. 333 (1969), for example, the Court condemned an exchange of price information among competitors as a price-fixing agreement in violation of Section 1 of the Sherman Act. The Court observed: "The exchange of price data tends toward price uniformity." 393 U.S. at 337. It explained: "The result of this reciprocal exchange of prices was to stabilize prices . . . . Knowledge of a competitor's price usually meant matching that price." Id. at 336-37.

Recognizing both the obvious antitrust problems and the serious business consequences associated with any "sharing" of the terms and conditions under which program services are licensed, programmers and distributors routinely take great efforts to guard against the public disclosure of carriage terms and conditions. For example, most of Viacom's carriage agreements have a confidentiality requirement, prohibiting the disclosure of the terms and conditions of the agreement to a non-party. In fact, in Viacom's recent antitrust lawsuit against one of its competitors, it found that programmers and distributors alike would disclose the terms of their carriage agreements for purposes of that lawsuit only on the express condition (as ordered by the court) that the information would not be disclosed to anyone other than outside counsel for the parties.

Even those who seek uniform pricing have recognized, in other contexts, that it is crucial that the Commission "protect the proprietary nature" of certain information. For example, the WCA "strongly object[ed] to a requirement that wireless operators reveal any proprietary information, such as the names and addresses of subscribers." Comments of WCA, MM Docket No. 92-266 at 9 (Jan. 27, 1993). Surely, the terms and conditions contained in carriage agreements and known only to the programmer and its licensee are no less "proprietary" in nature than the names and addresses of subscribers that others insist on protecting.

In sum, preserving intense competition at the programmer and distributor levels can only be achieved by carefully limiting access to the terms and conditions of carriage agreements.

VI. Program Carriage Agreement Issues

The Act addresses anticompetitive conditions Congress traced to two different causes: (1) in Section 628, those attributed to vertical integration between a program service and a cable operator and (2) in Section 616, those arising out of the market power held by cable operators due to the manner in which certain operators exercise control over each programmer's ability to obtain access to consumers in the cable operator's franchise areas.

Interestingly, while the overwhelming weight of the comments is directed to Section 628, the views expressed on Section 628, especially those of non-cable distributors, are rooted not in their concerns for the effects of vertical integration but in their concern for the market power of cable operators, whether or not they are vertically integrated. For example, the array of expansive proposals for defining an "attributable interest" (some of which would not even require ownership links) reveals a fundamental concern for the market power of cable operators rather than a concern with vertical integration. Similarly, expansive interpretations of the geographic area in which Section 628 should be applied obviously are rooted in a concern about the inherent market power of a cable operator rather than concerns arising from vertical integration.

Accordingly, the Commission should recognize that the problems targeted by Section 616 are more pervasive and more important than the issues treated by Section 628. There is, therefore, a sound basis for imposing different, and stricter standards under Section 616 than those that will be fashioned for Section 628.

The Commission asks for specific comments on how "coercion" should be defined for the purposes of Section 616(a)(2) and how "discrimination" should be defined in the context of Section 616(a)(3). The Commission advances the view that coercion and discrimination in the context of carriage agreements involve different activities from those discussed with regard to Section 628 regarding program access. NPRM at ¶ 57. Viacom agrees that different activities are involved and submits that different standards should be developed for defining